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NOTES

The Sophistic Method?: Dialectic and Eristic in Legal Pedagogy

*Thomas Cothran*¹

"And thus there seems a reason in all things,
even in law."²

— Herman Melville, *Moby Dick*

"Since the man of common sense makes his appeal to feeling, to an oracle within his breast, he is finished and done with anyone who does not agree; he only has to explain that he has nothing more to say to anyone who does not find and feel the same in himself. In other words, he tramples underfoot the roots of humanity. For it is the nature of humanity to press onward to agreement with others; human nature only really exists in an achieved community of minds. The anti-human, the merely animal, consists in staying within the sphere of feeling, and being able to communicate only at that level."³

— G.W.F. Hegel

INTRODUCTION

One of the most important reports in the legal education reform debate, the Carnegie Report,⁴ has attempted to move a robust concept of legal ethics to the center of the current education reform debate. This concept of legal ethics does not concern itself merely with what lawyers must do to

¹ Thomas Cothran is a third year student at the University of Kentucky College of Law. He is indebted to Professor Kightlinger, for looking over an earlier form of this paper; to his mother and father, for teaching him the meaning of education; and to his wife, Erin, for her understanding and constant encouragement.

² HERMAN MELVILLE, *MOBY DICK* 371 (1923).

³ G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* 43 (A.V. Miller trans., 1977).

⁴ The history and impact of the Carnegie Report [hereinafter the Report] are discussed in Part I.

avoid running afoul of the relevant bar association, nor even with merely what lawyers ought to do. Rather, the Carnegie Report tries to resurrect the question of what lawyers ought to *be* within the context of the legal profession, and this question directly implicates the broader inquiry of what the legal profession should be. In this way, the Carnegie Report identifies a fundamental problem in legal education: law schools turn out their students without ever giving them a picture of what the legal profession is for or how they might fit in to its broader socio-political purpose, with the (unsurprising) result that lawyers often act as if they do not know of these broader social obligations. The Carnegie Report claims this has generated a problem that reaches the proportion of a "crisis of professionalism."

To remedy the situation, the Report recommends that law schools teach students a more robust concept of legal ethics that illuminates the lawyer's role in light of the purpose of the legal profession, and that law schools order their theoretical and practical training according to this concept. The Carnegie Report has been credited with identifying the stunted concept of legal ethics as a critical problem in legal education; however, it has been criticized for not providing an adequate solution. To make good on the abstract claim that the current void in legal ethics and alleged crisis of professionalism may be remedied by a more rigorous account of legal ethics in terms of the purpose of the legal profession as a whole, the Carnegie Report must demonstrate that such a concept is both theoretically possible and actually practicable.

I argue that the Carnegie Report's failure to adequately articulate the concept of professionalism that law schools should instill in their students results from a methodological problem—the failure to attend to the theoretical justification of a teleological concept of legal ethics (i.e., a concept of legal ethics grounded in the end of the legal profession).⁵ Unless one addresses the question of method (i.e., on what rational basis a concept of legal ethics can be grounded) one becomes vulnerable to the sort of skepticism that doubts the possibility of any such purpose. Before one can speak of the purpose of the legal profession, one must make some determination of how one might go about discovering a rational basis for such a purpose. If this rational basis is lacking, a central aspect of the Carnegie Report's assessment falls apart, for the concept of legal professionalism — as the Report conceives of it — would be unobtainable. Without the possibility of a reasoned account of the purpose of the legal profession, the Carnegie Report's ambitious call to place ethics training at the center of legal education reform is incoherent.

I will argue that the Socratic method provides a methodological solution to the problem. The Socratic method, properly used, is a form of dialectical

⁵ Professor Mark Kightlinger, Wyatt, Tarrant and Combs Professor of Law at the University of Kentucky College of Law, pointed out in conversation the teleological implications of the Carnegie Report (which color the following discussion of the Carnegie Report).

reasoning, which will allow us to deal in a rigorous way with the questions raised by the Carnegie Report. This argument takes a circuitous route.

In Part I, I will survey two aspects of the Carnegie Report's assessment of legal education, as well as the academic discussion that has followed: the controversy surrounding the continued reliance of law professors on the Socratic method as a pedagogical device and the "crisis" of professionalism. This will orient the subsequent argument within the current debate surrounding the Carnegie Report in particular and the debate concerning legal education reform in general.

In Part II, I will set up the central epistemological problem: how does one go about determining what the purpose of the legal profession is? This problem has two aspects: the particular problem of how law schools might go about conducting a form of legal ethics training that instructs future lawyers about their profession in light of that profession's purpose (as the Carnegie Report suggests), and the universal problem of how could one claim concerning the purpose of the legal profession be privileged over another. By examining a particular case where a task force tried to implement legal ethics training in light of the recommendations of the Carnegie Report and failed to do so because the task force members did not agree on what the purpose of the legal profession might be, I will show that this practical problem—how does a particular school implement legal ethics training in light of the Carnegie Report—is the product of a theoretical problem: when we disagree about the moral purpose of something, is this disagreement completely intractable without one claim having any more solid rational foundation than another? Or is there some way to judge one person's opinion right and another's wrong? Here we face the challenge of skepticism: is there any rational foundation for moral claims at all? This theoretical problem must find some resolution for the practical problem faced by the task force to be resolved, for if the legal profession has no guiding purpose, then anyone who tries to implement legal training based on such a purpose is wasting their time. The challenge of skepticism is a methodological challenge: given the fact that people disagree fundamentally about moral issues (whether related to legal education or otherwise), by what method can such disputes be resolved? I will propose dialectical reason as a solution to the impasses that arise in debates over ethical questions.

Section III offers a general account of dialectic and explains the relation between dialectical reason and the Socrates' method. This requires first distinguishing the Socrates' method from forms of disputation that appear similar on the surface, but rather than embodying dialectical reason, embody something like the skepticism encountered in Section II. Then Section III.B offers a general description of dialectical reasoning. However, it turns out that while the general features of dialectical reason can be described, it cannot ultimately be abstracted from its particular applications (unlike

formal logic). Ultimately, therefore, dialectic must vindicate itself in action, and I propose this take place in the classroom, in the proper use of the Socratic method.

I. THE CARNEGIE REPORT

A. *The Carnegie Report's Historical Background*

The Carnegie Report⁶ grew out of a larger project on the education of professionals commissioned by the Carnegie Foundation for the Advancement of Teaching. Andrew Carnegie originally formed the Foundation in 1905 as a trust that would provide pensions for professors and teachers.⁷ Under the leadership of Henry Smith Pritchett, a prominent educator, scientist, and President of the Carnegie Foundation from 1906 to 1930, however, the Carnegie Foundation soon pursued the more ambitious goal of the standardization of American education at every level.⁸ In 1910, the publication of Abraham Flexner's influential *Medical Education in the United States and Canada* marked the beginning of the Carnegie Foundation's concerted effort to standardize professional education.⁹ Flexner's report enjoyed tremendous success, and before long Flexner's curricular model became standard in medical schools in the United States.¹⁰ The Carnegie Foundation continued its program for the standardization of professional education, working to reform engineering schools, to professionalize the teaching profession, and to study legal education.¹¹

The Carnegie Foundation's work in legal education reform antedates the 2007 Carnegie Report by almost a century. In 1914 the Carnegie Foundation published the "Redlich Report," which, like the recent Carnegie Report, criticized the Socratic Method.¹² This criticism was relatively tempered, and the Redlich Report did not advocate a strong shift in pedagogy away from the Socratic method.¹³ Less than a decade later, the Carnegie Foundation published another report on legal education by

6 See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

7 ELLEN CONDLIFFE LAGEMANN, *PRIVATE POWER FOR THE PUBLIC GOOD* 37 (1983).

8 See *id.* at 37-38.

9 See *id.* at 59.

10 See *id.* at 72.

11 See *id.* at 75-89; WILLIAM S. LEARNED ET AL., *THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, THE PROFESSIONAL PREPARATION OF TEACHERS FOR AMERICAN PUBLIC SCHOOLS* (1920); CHARLES RIBORG MANN, *THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, A STUDY OF ENGINEERING EDUCATION* (1918).

12 See JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 41 (1914).

13 See *id.*

Alfred Reed,¹⁴ which was more critical of the Socratic method.¹⁵

Beginning with the 1995 publication of William Sullivan's *Work and Integrity*, the Carnegie Foundation has rededicated itself to the reform of professional education.¹⁶ This new phase of the Carnegie Foundation's effort focuses not only upon the ability of the professional schools to prepare students for the practical demands of professional life, but on the ethical and political aspects of professionalism.¹⁷ Two themes in the Carnegie Report's historical background are significant: the criticism of the Socratic method and the more recent concern for the ethical and political responsibilities of the legal profession. These two themes must be examined as they appear in the Carnegie Report itself.

B. The Carnegie Report's Apprenticeship Model

The Carnegie Report organizes the tasks of professional education under the concept of apprenticeship. Apprenticeship emphasizes the practical nature of legal education: law schools do not teach students simply to inform them what the law is, but so that the students become practitioners of the law. In professional education, apprenticeship is the initiation of "novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethically) like professionals."¹⁸ The concept of apprenticeship includes within itself three dimensions: thinking, performing, and conducting oneself ethically. The thinking aspect may be called the "intellectual apprenticeship" and involves the formal knowledge and way of thinking (i.e., "thinking like a lawyer") that belongs to the legal profession.¹⁹ The Carnegie Report links the Socratic method with this apprenticeship as its pedagogical instantiation. The performing aspect may be called the "practical apprenticeship", and refers to the forms of expert practice that belong to the profession (e.g., knowing how to write an appellate brief).²⁰ The ethical aspect may be called the "apprenticeship of professional identity and purpose" and refers to the self-understanding of the lawyer as a lawyer and the lawyer's understanding of the purpose of the legal vocation.²¹ It is the first and the third apprenticeship that concern us here; the second will be examined only incidentally.

14 ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (1921).

15 See, e.g., *id.* at 276–78 (charging that the method fails to develop properly students' practical skills).

16 See SULLIVAN, *supra* note 6, at 15.

17 See *About Carnegie*, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, <http://www.carnegiefoundation.org/about-us/about-carnegie> (last visited Sept. 5, 2010).

18 SULLIVAN, *supra* note 6, at 22.

19 See *id.* at 28.

20 See *id.*

21 See *id.*

C. The Intellectual Apprenticeship

The intellectual apprenticeship includes both formal knowledge (e.g., the basic principles of tort law) and the way of thinking about that formal knowledge (what is often called “thinking like a lawyer”).²² To put it another way, the intellectual apprenticeship includes both the object of legal knowledge and the way in which the law student comes to know that object. The former receives comparatively little attention in either the Carnegie Report or in the discussions about the Carnegie Report, since it is relatively uncontroversial that law students ought to learn the basic principles of the various fields of law.²³ The Carnegie Report and the subsequent discussion about the Report focus more heavily on the latter, the way in which one comes to know the law. The Report identifies this aspect of the intellectual apprenticeship primarily with the Socratic or “case–dialogue” method.²⁴

The Carnegie Report gives a mixed assessment of the Socratic method.²⁵ The Report maintains that the Socratic method works well in early courses that focus primarily on case law, but loses its effectiveness in the later stages of law school.²⁶ More importantly, the Report argues that the case–dialogue method exercises a covert effect on students’ moral judgment, because it brackets issues of justice and turns real events into legal abstractions.²⁷

Many scholars have seized upon the negative aspects of the Carnegie Report’s assessment of the case–dialogue method. Many concur with the Report’s criticism that the Socratic method fails to teach adequately the more utilitarian aspects of legal practice.²⁸ This, however, is not so much

²² See *id.*

²³ Arguments about the degree to which formal legal training ought to receive attention in comparison with the practical or ethical aspects of legal practice will be treated in the next section on practice.

²⁴ See SULLIVAN, *supra* note 6, at 50.

²⁵ See generally James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 INT’L J. LEGAL INFO. 1 (2007) (comparing the Carnegie Report’s assessment of the Socratic method with the Carnegie Foundation’s earlier Redlich report).

²⁶ See SULLIVAN, *supra* note 6, at 75–78; see also Ann Juergens & Angela McCaffrey, *Roleplays as Rehearsals for “Doing the Right Thing”—Adding Practice in Professional Values to Moldovan and United States Legal Education*, 28 WASH. U. J.L. POL’Y 141, 154–55 (2008).

²⁷ See SULLIVAN, *supra* note 6, at 52–54.

²⁸ See Sean M. O’Connor, *Teaching IP from an Entrepreneurial Counseling and Transactional Perspective*, 52 ST. LOUIS U. L.J. 877, 877–78 (2008); see Kate Nace Day & Russell G. Murphy, “Just Trying To Be Human in This Place”: *Storytelling and Film in the First-Year Law School Classroom*, 39 STETSON L. REV. 247, 254 (2009); Jessica Dopierala, *Bridging the Gap Between Theory and Practice: Why are Students Falling Off the Bridge and What are Law Schools Doing to Catch Them?*,

a criticism of the case–dialogue method as it is a criticism of the excessive dependence of law schools upon the case–dialogue method to the exclusion of other, more practice-oriented methods.²⁹

Some legal scholars have adopted the Carnegie Report's more fundamental critique of the Socratic method—that it has a concealed effect on students' moral judgment.³⁰ Professors typically employ the Socratic method in such a way that students are taught to be able to argue both sides of the case. This approach trains students to engage in an analysis that attempts to operate without considerations of justice, and it risks reducing clients to abstractions by not taking into account the clients' extra-legal needs as real persons.³¹

D. The Ethical Apprenticeship

The Carnegie Report identifies the apprenticeship of professional identity as the apprenticeship that draws together into a whole the intellectual and practical apprenticeships.³² Though a clear definition of the third apprenticeship is hard to formulate precisely, the Carnegie Report explains that professional identity involves understanding oneself in light of the purposes of one's profession.³³ According to the Carnegie Report, the modern American legal profession had its origin in a social compact between the profession and society, in which the profession pledged to act for the public good in exchange for the right to practice law, and so the Carnegie Report argues that any understanding of the purposes of the profession requires a return to this social compact.³⁴ However, this leads to an antinomy: for although the lawyer has a duty to the public, the lawyer also has a duty to his or her client's private interests.³⁵ The purpose of the legal profession involves both a duty to the proper functioning of legal

85 U. DET. MERCY L. REV. 429, 439 (2008); Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335, 338–39 (2010).

29 See Robert C. Illig et al., *Teaching Transactional Skills Through Simulations in Upper-Level Courses: Three Exemplars*, 10 TENN. J. BUS. L. 15, 23–24 (2009); Juergens & McCaffrey, *supra* note 26, at 155 (noting that the Carnegie Report regards the Socratic method as having value in moderation).

30 See SULLIVAN, *supra* note 6, at 52–54.

31 See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 264 (2010); Karen H. Rothenberg, *Recalibrating the Moral Compass: Expanding "Thinking Like a Lawyer" into "Thinking Like a Leader,"* 40 U. TOL. L. REV. 411, 411–12 (2009); Maria O'Brien Hylton, *Creeping Impoverishment: Material Conditions, Income Inequality, and ERISA Pedagogy Early in the 21st Century*, 34 FORDHAM URB. L.J. 1355, 1361 (2007).

32 See SULLIVAN, *supra* note 6, at 14.

33 See *id.*

34 See *id.* at 30.

35 See *id.* at 82.

institutions and a duty to be a “zealous advocate for [one’s] client,”³⁶ and the Carnegie Report locates professional identity within this tension.³⁷

The Carnegie Report’s general judgment that law schools treat the apprenticeship of professional identity as subordinate to the intellectual apprenticeship — or, put more simply, that law schools subordinate ethical issues to knowing the law — has met with some agreement.³⁸ One scholar, Lisa Pinland, relies on the Carnegie Report’s findings to argue that even where law schools do focus on legal ethics, the training tends to be attuned to the needs of litigating rather than transactional attorneys.³⁹ More fundamentally, the Report claims that when schools do teach legal ethics, they do so too narrowly.⁴⁰

The Carnegie Report advances a more robust vision of legal ethics than it claims law schools teach. The Report advances a model of “civic professionalism” that draws on Sullivan’s *Work and Integrity*.⁴¹ *Work and Integrity* puts forward a general ethical model of professionalism, which the Carnegie Report then develops to more specifically suit the legal profession.

The Carnegie Report’s working out of the concept of civic professionalism in the specific context of legal practice has received comparatively more attention in the legal literature than has *Work and Integrity*’s more general model.⁴² Some scholars have expressed enthusiasm for the Carnegie Report’s broader ethical idea of “civic professionalism,”⁴³

³⁶ *Id.*

³⁷ *See id.* at 82, 131–32.

³⁸ *See* Arthur Best, *Student Evaluations of Law Teaching Work Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree*, 38 SW. U. L. REV. 1, 31–32 (2008) (supporting the Carnegie Report’s assertion that ethical training is largely overlooked in law schools by pointing out that few student evaluation forms ask about whether ethics receives attention in class); Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1333 (2009); David M. Tanovich, *Learning to Act Like a Lawyer: A Model Code of Professional Responsibility for Law Students*, 27 WINDSOR Y.B. ACCESS TO JUST. 75 (2009) (exploring the issue in Canada). *But see* Stephen Griffin, *The Carnegie Report: Can Legal Education Be Reformed?*, BALKINIZATION (Mar. 8, 2008, 3:02 PM), <http://balkin.blogspot.com/2008/03/carnegie-report-can-legal-education-be.html> (remarking that the Carnegie Report’s discussion of the ethical apprenticeship resonated less in a faculty discussion than did the Report’s description of the practical apprenticeship).

³⁹ *See* Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS’N LEGAL WRITING DIRECTORS 118, 126 (2008).

⁴⁰ *See* SULLIVAN, *supra* note 6, at 31–33.

⁴¹ *See* WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 98 (2d ed. 2004) [hereinafter SULLIVAN, *WORK AND INTEGRITY*]; SULLIVAN, *supra* note 6, at 15.

⁴² *See, e.g.*, Francis J. Mootz III, *Vico’s “Ingenious Method” and Legal Education*, 83 CHI.–KENT L. REV. 1261 (2008) (providing a fairly esoteric discussion of the recommendations of the Carnegie Report in light of the Italian philosopher Giambattista Vico); Melissa H. Weresh, *I’ll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 353 (2009).

⁴³ *See* Nicola A. Boothe–Perry, *Professionalism’s Triple E Query: Is Legal Academia Enhanc-*

and others have supported its call for wider discussions of justice in the classroom.⁴⁴ However, despite the Carnegie Report's call for discourse on what it means to be a lawyer, it has been criticized for being too reticent to come out and say what exactly this means.⁴⁵

II. THE PROBLEM OF SKEPTICISM

Unless the Carnegie Report's concept of professional identity can be concretely formulated, it cannot be a practicable option for law schools. Judge Marcia S. Krieger, a federal district court judge in Colorado, recounts her experience on a task force designed to implement the recommendations of the Carnegie Report.⁴⁶ Krieger found herself charged with the task of implementing the Carnegie Report's recommendations regarding the apprenticeship of professional identity.⁴⁷ As the task force discussed the ethical aspect of legal education, "it became apparent that we educators, lawyers and judges could not agree on the components of a professional identity or a common set of values that should be taught to law students."⁴⁸ In the end, the task force gave up trying to implement the Carnegie Report's recommendations on ethical training, and decided just to focus on teaching the Model Rules of Professional Conduct.⁴⁹ Judge Krieger reports that the experience shook her firmly held belief that legal professionals share a common purpose.⁵⁰

Judge Krieger's experience demonstrates the practical difficulty in implementing the Carnegie Report's broad concept of legal ethics.

ing, *Eluding, or Evading Professionalism?*, 55 LOY. L. REV. 517, 552 (2009); Timothy W. Floyd & John Gallagher, *Legal Ethics, Narrative, and Professional Identity: The Story of David Spaulding*, 59 MERCER L. REV. 941, 942–43 (2008); Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW. 4, 4 (2008).

44 See L. Timothy Perrin, *The Consequences of Presenting False Evidence and Perjury: The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707, 1719–21 (2007); see also Stefano Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, 13 J. LEGAL WRITING INST. 207, 217–18 (2007) (agreeing with the Carnegie Report that practical training, such as students receive in clinics, has benefits that extend to the ethical apprenticeship). See generally Robert K. Vischer, *Professionalizing Moral Engagement (A Response to Michael Hatfield)*, 104 NW. U. L. REV. COLLOQUY 33, 42–44 (2009) (discussing the widespread absence of meaningful discussions of justice in law schools).

45 See Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1021 (2009) ("Despite its engagement with values and professional ethics, the Carnegie Report did not analyze the values or professional ethics of the profession itself.").

46 Judge Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Both-er?*, 86 DENV. U. L. REV. 865, 865–66 (2009).

47 See *id.*

48 *Id.* at 866.

49 See *id.*

50 *Id.* at 865. Judge Krieger proceeds to advance her view that the common purpose of the profession is the rule of law. *Id.* at 888–98.

Unlike a legal ethics class that simply teaches the model rules and case law, the Carnegie Report's concept of professional identity requires that normative judgments be made, and that educators take a stand on what constitutes the purpose of the legal profession. The viability of the Report's recommendations regarding ethics training opens out into the wider question of general possibility of normative ethical judgments as such. If normative ethical judgments lack a rational foundation, then the Carnegie Report's concept of the ethical apprenticeship is not even theoretically coherent, much less a practicable possibility for law schools. Furthermore, the theoretical problem (the possibility of normative ethical judgments in general) must be confronted before the practical problem (which normative ethical judgments ought to be taught to law students) can be resolved.

Richard Posner articulated just this sort of moral skepticism in his Holmes Lectures,⁵¹ where he argued that "moral theory does not provide a solid basis for moral judgments."⁵² While Posner addresses moral theory primarily in the context of the legal reasoning judges do,⁵³ his argument bears directly on the existence of a rational foundation for the Carnegie Report's recommendations concerning the teaching of a more robust view of legal ethics; for if moral judgments are impossible in general, the particular sorts of moral judgments intractably bound up with the ethical apprenticeship are likewise impossible. In that case, the failure of Judge Krieger's task force to implement the Carnegie Report's recommendations concerning the third apprenticeship was inevitable.

Posner argues that because there are no universally agreed upon moral principles that could "serve as standards for moral judgment,"⁵⁴

51 Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

52 *Id.* at 1639. It should be noted that Posner uses the word "morality" in a way that slips in deontological and pragmatic presuppositions. He defines morality as "the set of duties to others . . . that are designed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct. It is about what we owe, rather than what we are owed . . ." *Id.* Posner's reliance on terminology of duty seems to suggest Posner has deontology in mind, while his emphasis on the passions suggests Humean considerations as well. Taking Posner's passage in isolation might suggest that Posner does not have in mind most forms of virtue ethics (ancient and modern) that have quite difference concerns. See G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958), available at <http://www.pitt.edu/~mthomps/mmp.pdf>. However, Posner includes several adherents to virtue ethics (John Finnis and Robert George, for example) in his list of intellectuals whose moral theory comes within the scope of his argument. See Posner, *supra* note 51, at 1638.

53 See Posner, *supra* note 51, at 1639 ("Moral theory is not something that judges are, or can be . . . good at, it is socially divisive, and it does not mesh with the actual issues in cases.").

54 *Id.* at 1640-41. Posner does concede that some moral principles seem to be held universally, but these, he says, are either tautological or "rudimentary principles of social cooperation" which are not sufficient to support moral judgments. *Id.*

moral realism is not a viable theory.⁵⁵ While this argument may appeal to common intuition, on closer scrutiny the argument fails to meet the basic standard for philosophical rigor.⁵⁶ Posner's argument is enthymematic: no universal moral principles sufficient to support moral judgments are accepted across cultures,⁵⁷ therefore no universal moral principles are true (i.e., moral realism is false).⁵⁸ If moral realism is false, no rational basis exists upon which the ethics training envisioned by the Carnegie Report is founded.⁵⁹ While the minor premise and conclusion are present, Posner omits the major premise: any universal moral principle must be accepted across cultures in order to be true. For Posner's argument to be cogent, this view must either be held by moral realists (in which case the argument would have rhetorical force), or Posner must independently demonstrate it. But it does not follow from the proposition that there exist moral principles that are universally true that these propositions will be held universally, nor does this criterion of truth hold up for other fields of enquiry.⁶⁰ If one

⁵⁵ See *id.* at 1641.

⁵⁶ Hegel addresses the tactic of citing the diversity of philosophic positions as proof that no such knowledge is possible in this way:

[I]n looking at such a multitude of opinions and so many philosophical systems of various kinds, we become perplexed about to which one we ought to adhere. We see that in the great matters to which we feel attracted and knowledge of which philosophy wishes to provide, the greatest minds have erred because they have been refuted by others. Since this is the experience of great minds, how am I, *ego homunculus*, to attempt a decision? ... For those who want to give the appearance of being interested in philosophy usually cite this diversity as their excuse for utterly neglecting it, despite their ostensible good will....

G.W.F. HEGEL, INTRODUCTION TO THE LECTURES ON THE HISTORY OF PHILOSOPHY 16 (T.M. Knox & A.V. Miller trans., 1985) [hereinafter INTRODUCTION TO THE HISTORY OF PHILOSOPHY].

⁵⁷ This assertion is not without controversy. John Mikhail points out that the sources Posner cites as proof of the proposition that there are no moral universals say exactly the opposite. See John Mikhail, Note, *Law, Science, and Morality: A Review of Richard Posner's The Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057, 1106–07 (2002) (arguing that the problem with Posner's assertion "is not that it is too scientific, but that it is not scientific enough").

⁵⁸ See Posner, *supra* note 51, at 1640–41.

⁵⁹ Posner conflates moral realism with a belief in moral universalism. While such a belief is a form of moral realism, it is not the only form of realism. Some moral realists, e.g., Aristotle, reject the formulation of universal principles as inappropriate to ethical inquiry but nevertheless hold that in a given situation there are objectively right or wrong courses of action. Therefore, if all belief in universal moral principles were false it would no more refute moral realism than the falsity of a position advocated by Newton would refute the whole discipline of physics. See *id.* See generally ROMA BURGER, ARISTOTLE'S DIALOGUE WITH SOCRATES: ON THE NICOMACHEAN ETHICS 48–56 (2008) (explaining the Socratic view that virtue is knowledge, that one must deny virtues when truth is recognized, and that in making choices, individuals chose the action through a development of a just character).

⁶⁰ As Ronald Dworkin says in response to Posner, "[a]ny moral principle, no matter how thoroughly embedded in our culture, language, and practice, may yet be false — or, no matter how thoroughly rejected, may yet be true." Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV.

were to attempt to ascertain the truth of an aspect of relativity theory, for example, one would not poll physicists and decide on the basis of the popularity of the theory its truth or falsity. Certainly one would not poll the general public for their views on physics. And surely Posner does not regard his own skeptical moral philosophy as disproven because it is not universally accepted. Rather, the proper course of action consists in engaging in the kind of demonstration appropriate to the discipline or the subject matter in order to ascertain the truth of the disputed issue.⁶¹ As in any other field of inquiry, the arguments ought to be examined on their merits, not their popularity.

The problem that Posner notes (that no significant moral principle enjoys universal acceptance) is the practical problem Judge Krieger recounts transposed to the theoretical level. Krieger found that her partners on the task force disagreed as to the common moral purpose of the legal profession, and this posed the practical problem that the task force could not implement the ethical recommendations of the Carnegie Report. Posner claims to find that agreement on moral principles does not exist universally, and this poses a theoretical problem from which he claims moral philosophy cannot recover. From Krieger's particular problem, we move to Posner's universal problem, and the resolution of that problem at the universal level opens the way to the resolution of the same problem on the practical level.

Posner's resolution of the problem concerning disagreement on moral issues does not possess any logical force, since his selection of a distinct criterion for normative moral judgments alone is both arbitrary and irrelevant. The skeptical criterion Posner implicitly advances⁶² (i.e., a moral principle must be universally accepted to be true) functions to stultify the intellect, preventing it from examining the merits of the particular arguments advanced in moral philosophy (except his own moral philosophy) upon the discovery that not everyone agrees on matters of

L. REV. 1718, 1719 (1998).

Martha Nussbaum identifies several problems with this criterion: it sets an impossible goal in order to prevent the examination of the arguments on their merits; it is detached from the sort of practical judgments people make every day; and the suspension of moral judgment opens the door to the free play of power, where "the powerless frequently lose out." Martha Nussbaum, Commentary, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 739-42 (1994).

61 As Aristotle says, "[I]t belongs to an educated person to look for just so much precision in each kind of discourse as the nature of the thing one is concerned with admits; for to demand demonstrations from a rhetorician seems about like accepting probable conclusions from a mathematician." ARISTOTLE, *Nicomachean Ethics* 2 (Joe Sachs trans., Focus Publishing 2002).

62 As Martha Nussbaum shows, the bare assertion of this criterion is common to moral skeptics. See Nussbaum, *supra* note 60, at 733.

morality.⁶³ Therefore, strictly speaking, Posner does not solve the problem at all; instead he asserts a standard that prevents resolution of the problem. If Posner's methodological mistake lies in asserting a technique that prevents examination of the merits of particular moral arguments, then the correct approach appears to lie in the examination of particular moral arguments.

We might modify Posner's skeptical argument in a way that would possess philosophical force.⁶⁴ In order to arrive at objective⁶⁵ moral principles, one either knows these immediately (for example, as a sort of immediate intuition) or mediately (for example, on the basis of an argument which begins from more immediately known principles or facts). It seems that objective moral principles are not known immediately, since there does not exist wide agreement on particular moral principles. But even if moral truths could be known immediately, there would be no way to mediate disputes as to particular moral principles. In Krieger's case, she might say that her moral intuition reveals that the purpose of the legal profession lies in the rule of law, but this would not convince someone else on the task force who intuits the purpose of the profession to be the economic maximization of human wellbeing. If moral truth can only be justified by intuition, then the Carnegie Report may be correct in a highly abstract

63 As Plato might put it, Posner concerns himself with people, not with what is true. See PLATO, *Sophist*, in PLATO: COMPLETE WORKS 235, 268 l. 246d (John M. Cooper ed., Nicholas P. White trans., 1997) [hereinafter *Sophist*].

64 Of course, many other arguments against some form of objective moral inquiry do exist. For example, David Hume argues that moral reasoning moves from what is the case to what ought to be the case, and that this "ought" can never be derived from an "is." DAVID HUME, *Of Morals*, in A TREATISE OF HUMAN NATURE 293, 302 bk. 3, § 1, pt. 1 (David Fate Norton & Mary J. Norton eds., 2007). However, this objection applies only to a categorical ethics (i.e., one that takes the basic form of "one must..."). For a discussion of moral realism and Hume's is/ought distinction, see Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 873–82. A hypothetical ethics (i.e., one that takes the form of "if one wants x, then one must...") does not have the same problem since it does not fundamentally rely on a categorical "ought." Therefore, this objection to the possibility of moral realism does not — assuming the is/ought argument is true — rule out the possibility of moral realism per se, but only certain forms of moral realism.

65 The term "objective" can be used in a number of ways. See THE OXFORD GUIDE TO PHILOSOPHY 667–68 (Ted Honderich ed., 2005). The term is used here to mean that moral inquiry directs itself toward actually existing things, rather than simply to express a cultural or personal viewpoint untethered to reality. This can be taken two ways: either that toward which moral inquiry is directed has some kind of independent existence apart from existing independent things (as, for Plato, the Forms exist in themselves), or that toward which moral inquiry is directed exists as an aspect, quality, etc. of an existing independent thing (as, for Aristotle, health exists, but is dependent for its existence on living things). See Friedrich Solmsen, *Dialectic Without the Forms*, in ARISTOTLE ON DIALECTIC: THE TOPICS 49 (G.E.L. Owens ed., 1968); see also JOSEPH OWENS, THE DOCTRINE OF BEING IN THE ARISTOTELIAN METAPHYSICS 159, 232 (3d ed. 1978) [hereinafter THE DOCTRINE OF BEING]. The resolution of that debate stands outside the scope of this essay.

sense to say that the legal profession has a transcendent moral purpose, but there is no possibility of a rational demonstration of this purpose.⁶⁶ Without such a reasoned account, the Carnegie Report's call for robust ethical training degenerates into intractable disagreement about normative ethics.

If, on the other hand, normative ethical judgments may be justified mediately through reasoned argument that begins somewhere else and proceeds to moral judgments from prior principles, one must determine where to begin. If moral inquiry begins with some apodictic, self-evident truth, then it could perhaps proceed by deductive reasoning to equally incontrovertible ethical judgments.⁶⁷ We have already seen, however, that any apodictic, self-evident principles would be disputed.⁶⁸ These principles would be indemonstrable, and since the truth of a premise is required to make a deductive argument logically compelling, the same problem would arise here as before: the disputed principle, known immediately, cannot be demonstrated, and any conclusion deduced from that premise is equally suspect.⁶⁹ Such a method cannot provide the basis for a reasoned argument for normative ethical judgments.⁷⁰

Another possibility exists.⁷¹ Instead of attempting to start with an incontrovertible principle, one might begin with one's own opinions as well as those of others on the subject and advance from these opinions to more certain truths. Clearly this method cannot proceed deductively, because the conclusions reached by deductive inquiry can be no more certain than the premises from which they are derived. The method employed must, therefore, have the capacity to proceed from that which is less certain to that

66 This is similar to the *aporia* Aristotle poses in the *Posterior Analytics*: if the first principles of a demonstrative argument are always subject to demonstration, then there is an infinite regress and no first principles can be established; but if there is no infinite regress, the ultimate first principles cannot be established by demonstration. ARISTOTLE, *POSTERIOR ANALYTICS* 37 ll. 72b5-20 (Hugh Tredennick ed. & trans., 1960) [hereinafter *POSTERIOR ANALYTICS*].

67 It is important to note that, contra Posner's suggestion, the starting point must be actually apodictic, not simply widely accepted. "The starting point is not that which is generally accepted or the reverse, but that which is primarily true of the genus with which the demonstration deals. . . ." *Id.* at 54-57 ll. 74b20-27.

68 See sources cited *supra* note 52.

69 In deductive syllogisms considered formally, the strength of the conclusion does not exceed the strength of the premises; in this sense, the premises are prior. See *POSTERIOR ANALYTICS*, *supra* note 66, at 31 ll. 71b20-25.

70 An example makes this clearer. Say that one tries to justify the death penalty because it increases human happiness in the aggregate. In doing so, the death penalty supporter does not claim that the death penalty is intuitively just, that its justice is self-evident, but rather that the death penalty is just because of a prior principle: that human happiness ought to be maximized. But if that prior principle is controverted by a death penalty proponent, and if that prior principle is supposed to be self-evident, then the dialogue is in much the same position it would be in had the death penalty supporter just claimed that the justice of the death penalty is self-evident.

71 See *infra* Part III.

which is more certain.⁷² This method is dialectical reason.⁷³ This method raises several apparent difficulties. If we admit the logical possibility that our opinions with which we begin are false, how can the conclusions which in some way depend on these opinions be true?⁷⁴ Even if one admits the logical possibility of objective moral principles, taking opinions that may well be flawed as the starting point of a course of inquiry seems to leave open the possibility that the inquiry will head off in the wrong direction entirely.⁷⁵ These concerns can only be evaluated once the dialectical procedure has been set forth.⁷⁶

In the absence of agreement on immediate moral principles, or immediate principles or facts from which moral principles may be deduced, we have turned to the dialectical method, in the hope that it possesses the ability to lead us from what is less certain to what is more certain. If this method proves feasible, it can provide the theoretical solution we seek (i.e., a rational basis for normative moral judgments). If it turns out that normative moral judgments have a rational basis in general, then this opens a way to resolve issues of legal ethics and legal ethics training in particular. Unless these questions can be resolved, the practical problem faced by Judge Krieger and others who wish to implement the Carnegie Report's recommendations concerning the ethical apprenticeship remains insoluble.

III. THE SHAPE OF DIALECTICAL REASON

This Section offers a general description of dialectical reason as it takes shape in the Socratic method. Section III.A distinguishes the Socratic method from two forms of discourse that look much like the Socratic method on the surface, but actually undermine the goals of the Socratic method—eristic and sophistry. Making this distinction serves two purposes

⁷² Or, as Aristotle put it:

[T]he natural road is from what is more familiar and clearer to us to what is clearer and better known by nature; for it is not the same things that are well known to us and well known simply. . . . But the things that are first evident and clear to us are more—so the ones that are jumbled together, but later the elements and beginnings become known to those who separate them out from these.

ARISTOTLE, *ARISTOTLE'S PHYSICS: A GUIDED STUDY* 33 (Joe Sachs trans., 1995); *see also* *POSTERIOR ANALYTICS*, *supra* note 66, at 31–32 ll. 71b30–72a6 (distinguishing things more knowable for us and things more knowable by nature).

⁷³ Dialectical reason differs from deductive reason because it does not need to assume the truth of its premises in order to reach its conclusions. *See* ARISTOTLE, *TOPICA* 273 ll. 100a25–101a4 (E.S. Forster ed. & trans., 1960) [hereinafter *TOPICA*] (distinguishing dialectical reasoning from demonstrative reasoning on the basis that the latter begins with apodictic principles while the former begins with mere opinion).

⁷⁴ *See* TERENCE IRWIN, *ARISTOTLE'S FIRST PRINCIPLES* 8–9 (1988).

⁷⁵ *See id.*

⁷⁶ *See infra* Part III.

in the larger inquiry. First, it illuminates dialectic by showing how it operates in the Socratic method but is undermined by the eristic and sophistry. Second, it provides a standard against which the “Socratic method” as practice in law school might be evaluated, for the case–dialogue method can conceivably be truly Socratic (in which case it embodies dialectical reason) or it can be a form of eristic or sophistry, in which case it engenders the sort of skepticism described in Section II.

Section III.B offers a general description of dialectic, setting out some of its general techniques and describing its various uses in the context of legal education. Here, however, the argument runs into its limitation: dialectical reasoning cannot be described in the abstract, since it takes its direction not from a general method, but from its particular subject matter. Dialectic must finally attest to its efficacy in its application to some particular question, and for our purposes this is question of the purpose of legal education. The true conclusion to the argument, therefore, takes place wherever the Socratic method is properly used to seek after the purpose of the legal profession.

A. Socratic vs. Eristic Method

The apparent difficulties facing dialectical reason seem to be compounded by linking dialectic with the Socratic Method, as I propose to do. For if, as the Carnegie Report alleges, the Socratic method teaches students how to argue for both sides of an argument in a way that seems detached from the truth of the matter, and the Socratic method is a particular pedagogical practice that embodies dialectical reasoning,⁷⁷ then it appears that dialectic in general — and the Socratic method in particular — cannot lead from less certain truths to more certain truths in a way that provides a rational foundation for normative ethical judgments. If anything, it seems as though dialectic, at least in the shape of the Socratic method, leads from less certain truths to the dissembling of any truth at all.

A superficial reading of some of the accounts of Socrates might lead one to believe that the allegations the Carnegie Report makes about the Socratic method apply to Socrates himself. For example, the Greek comedic playwright Aristophanes depicted Socrates in *The Clouds* as one who taught his students to make the worse argument seem the better in order to win lawsuits and defraud creditors.⁷⁸ In *The Clouds*, Pheidippides, a student of Socrates, armed with the ability to refute any argument that would condemn his behavior, beats his own father, illustrating the supposed destructive effect of Socrates’ teaching on the fabric of the family and Greek

⁷⁷ See generally Ryan Patrick Alford, *How Do You Trim the Seamless Web? Considering the Unintended Consequences of Pedagogical Alterations*, 77 U. CIN. L. REV. 1273 (2009).

⁷⁸ See ARISTOPHANES, *The Clouds*, in *LYSISTRATA AND OTHER PLAYS* 75, 107–17 (Alan H. Sommerstein trans., 2d ed. 2002).

society.⁷⁹ Aristophanes' view that Socrates' teachings undermined the basis for Athenian morality was apparently a frequent accusation: while pleading for his life in front of an Athenian jury on charges of corrupting the youth, Socrates acknowledged that he had been accused for many years of making the worse argument seem the better,⁸⁰ and the jury apparently found these accusations convincing enough to sentence him to death.⁸¹ Even Plato portrays Socrates as wishing to learn how to "fight[] in arguments and [to] refut[e] whatever may be said, no matter whether it is true or false."⁸²

A more careful reading of Socrates' method and doctrine as portrayed by Plato reveals not only that Socrates did not argue simply for the sake of winning arguments, but that such argumentation was precisely what Socrates opposed. Socrates clearly distinguished his method from eristic, defining eristic as "cute and contentious arguments that strain toward nothing more than outward show and competitions in lawsuits as well as private gatherings," while Socrates' own method "strain[s] by every means to seek the truth for the sake of knowing"⁸³ Such practices, Socrates claimed, brought the practice of philosophy into disrepute and caused the intellectually immature to fall prey to skepticism.⁸⁴ Socrates does not object to eristic on solely aesthetic or practical grounds: his case against eristic is intractably bound up with his account of the relation of language to reality and of the function of language in political society.

1. Socrates' Objection to Eristic: The Relation of Language Its Object.—In the *Republic*, Socrates distinguishes between eristic and dialectic by saying that the latter makes distinctions on the basis of the forms, while the former pounces on verbal contradictions in the opponent's speech.⁸⁵ Socrates' point stands even if one rejects the Platonic theory of the Forms;⁸⁶ the salient point is simply that dialectic uses language in a way that follows from the nature of the object of its inquiry.⁸⁷ Rather than make distinctions in order to gain an advantage with regard to the discussion, the dialectician makes distinctions in language according to the distinctions that inhere in

79 See *id.* at 123–29.

80 See PLATO, *Apology*, in PLATO: COMPLETE WORKS 17, 19 ll. 18b–c (John M. Cooper ed., G.M.A. Grube trans., 1997).

81 See *id.* at 32 l. 35d, 34 l. 38b.

82 PLATO, *Euthydemus*, in PLATO: COMPLETE WORKS 708, 710 ll. 272a–b (John M. Cooper ed., Rosamond Kent Sprague trans., 1997) [hereinafter *Euthydemus*]. But *Euthydemus* is an ironic dialogue.

83 PLATO, *REPUBLIC* 195 l. 499a (Joe Sachs trans., 2007) [hereinafter *THE REPUBLIC*].

84 See *id.* at 237 l. 539c.

85 See *id.* at 147 l. 454a.

86 That is, if one rejects the thesis that the intelligible structure of things transcends the sensible world.

87 Indeed, in Plato's *Sophist*, the Eleatic Visitor argues that the forms and their relations are a prior condition for the possibility of speech. See *Sophist*, *supra* note 63, at 283 l. 259c.

that to which language refers.⁸⁸

For example, if Socrates and Meno are discussing whether virtue is a kind of knowledge,⁸⁹ the nature of the conversation will be radically different — though superficially similar — depending on whether the interlocutors are attempting to investigate the distinction between virtue and knowledge according to the nature of virtue and knowledge, or whether they make distinctions according to what gives them the upper hand in debate.⁹⁰ If Socrates simply wishes to win the debate, he will probably exploit Meno's ignorance rather than correct it, use tactics to confuse Meno so that Meno may not be able to provide a convincing rejoinder, cause Meno to state his case differently than he means it, or to suppress distinctions crucial to Meno's argument.⁹¹ As Socrates puts it, in eristic one is given to

"[F]rivility" because even if a man were to [be skilled at eristic], he would be none the wiser as to how matters stand but would only be able to make fun of people, tripping them up and overturning them by means of the distinctions in words, just like the people who pull the chair out from under a man who is going to sit down and then laugh gleefully when they see him sprawling on his back.⁹²

When the aim of a colloquy is not to find the truth that exists about the matter under discussion, but simply to be able to adeptly argue first one side, then the other, the colloquy cannot rightly be called "Socratic." To the extent that law schools use something like eristic, a term such as the "case-dialogue method" would be more fitting than the Socratic method.

The Socratic method and eristic do have some similarities. Both take up first one hypothesis, then another to see where they will lead. Both seek to identify contradictions in the interlocutor's position. But in taking up different hypotheses and in identifying contradictions in the other's position, the dialectician has a view toward the truth of the matter, and although superficially the two methods look the same, their structures are fundamentally different. By taking up one hypothesis, then another, the practitioner of eristic seeks to defeat his interlocutor or to shield himself from defeat by obscuring weaknesses in his own position. The dialectician,

⁸⁸ See TOPICA, *supra* note 73, at 325 ll. 108a1–35 (arguing that "dialecticians must be very much on their guard against such verbal discussion").

⁸⁹ See PLATO, *Meno*, in PLATO: COMPLETE WORKS 870, 887–89 ll. 86d–89c (John M. Cooper ed., G.M.A. Grube trans., 1997) [hereinafter *Meno*].

⁹⁰ As Plato's Eleatic Visitor put it, as dialecticians, "we're not concerned with the people; we're looking for what's true." *Sophist*, *supra* note 63, at 268 l. 246d. Socrates too advised one of his friends not to be concerned with the ones promulgating arguments, but instead to "give serious consideration to the thing itself." *Euthydemus*, *supra* note 81, at 745 ll. 307b–c.

⁹¹ For examples of these sorts of tactics, see *Euthydemus*, *supra* note 81, at 712–14 ll. 275–277c.

⁹² *Id.* at 715 l. 278b; see also PLATO, *Phaedo*, in PLATO: COMPLETE WORKS 49, 87 l. 101c (John M. Cooper ed., G.M.A. Grube trans., 1997) [hereinafter *Phaedo*].

on the other hand, examines various hypotheses for the sake of intellectual rigor, in a wider project of organized inquiry in order to test these hypotheses, disregarding those that don't stand up to critical inquiry and adopting those that do.⁹³ In this fashion, the inquiry can move from those opinions which are less certain to those that hold up better to scrutiny, and the dialectic can proceed with greater certainty.⁹⁴ While the practitioner of eristic uses dialectic as a weapon against his opponent,⁹⁵ the dialectician also subjects his own views to the machinery of the dialectic. For this reason, Socrates declares that he would like nothing more than to be shown his own errors;⁹⁶ if he held on to his errors, protecting them from the scrutiny he applies to other opinions and hypotheses, he would be mired in error without the hope of escape. Thus, while eristic might proceed in a haphazard fashion according to what benefits the interlocutors, dialectic proceeds in an orderly fashion, examining all the relevant opinions in the proper order so as to be rigorous enough to yield the truth of the matter.⁹⁷

Socrates also maintained that dialectic has an inherently pedagogical dimension, whereas those concerned with “clever and disputatious debate[]” care only about refuting the position of their interlocutor.⁹⁸ In eristic, the parties relate to each other as one combatant with another, while the relationship between partners in dialectic is friendship.⁹⁹ Out of this friendship, dialecticians do not try to obfuscate the subject of the discussion, but to find answers that are true and “in terms admittedly known to the questioner.”¹⁰⁰ The pedagogical advantages of dialectic, which I propose law schools take better advantage of, are therefore not coincidentally related to dialectic itself, but follow from both the nature of dialectic (as a conversational search for the truth about the subject) and its practice (friendship between conversational partners). Put another way, if dialectic is a conversation in which the truth about things is sought, and

93 See *Phaedo*, *supra* note 91, at 87 ll. 101d–e.

94 See *id.*

95 See *Euthydemus*, *supra* note 81, at 712–14 ll. 275–277c.

96 See PLATO, *GORGAS* 42 l. 458a (Joe Sachs trans., 2009) [hereinafter *GORGAS*].

97 In a complex metaphysical discussion of the nature of the one, plurality, and the unlimited, Socrates distinguishes between dialectic and eristic by saying that dialectic consists in searching for the forms of things and, once having found them, moving to the next inquiry into form, and so on. Eristic, on the other hand, moves haphazardly (instead of according to the forms of things) and skips to the end of an inquiry without the intermediate inquiries. See PLATO, *Philebus*, in PLATO: COMPLETE WORKS 398, 404–05 ll. 16c–17 (John M. Cooper ed., Dorothea Frede trans., 1997); see also *GORGAS*, *supra* note 95, at 38 l. 454c (exhibiting the same concern for methodological precision in dialectical inquiry).

98 *Meno*, *supra* note 88, at 875 l. 75c.

99 See *id.* ll. 75c–d. Giorgio Agamben has written a very interesting essay that has some relevance here on the centrality of friendship in philosophic practice. See GIORGIO AGAMBEN, *The Friend*, in WHAT IS AN APPARATUS? 25 (David Kishik & Stefan Pedatella trans., 2009).

100 *Meno*, *supra* note 88, at 875 l. 75d.

the relationship between dialecticians is friendship, then the truth about things will be sought both for oneself and the other. Dialectic as practiced in the Socratic method is thus inherently pedagogical.

2. *Socrates' Objection to Eristic: The Relation of Language to Politics.*—While the practice of making the worse argument seem the better may be performed for the sake of frivolity and fun, as in *Euthydemus*,¹⁰¹ the same practice is bound to take on a more insidious form in the realm of politics.¹⁰² Plato takes up the darker side of eristic in *Gorgias*. In *Gorgias*, Socrates distinguishes between two forms of public persuasion: “one that provides belief without knowing, another that provides [belief and] knowledge.”¹⁰³ The former sort of persuasion we will call sophistry,¹⁰⁴ and it is the political development of eristic. Sophistry, like eristic, uses language in a way that does not follow from the truth about the subject of inquiry,¹⁰⁵ but sophistry does so in a different context and for different reasons. While eristic primarily takes place in private gatherings for the amusement of the parties present,¹⁰⁶ sophistry takes place in the public sphere about matters of public concern.¹⁰⁷ As one proponent of sophism tells Socrates, the man who has the power to persuade the public, jurors, legislators, and other civic

¹⁰¹ See *Euthydemus*, *supra* note 81, at 715 l. 278b; see also *supra* text accompanying note 91.

¹⁰² Socrates's idea of the nature of politics largely concerns the same subject-matter as our modern idea of politics, such as the administration of law and the coercive power that belongs to the government. But it is important to note that his concept of politics is far more robust than the modern view, in which the purpose of government is primarily to safeguard the autonomous functioning of the will in one's private life. Socrates understands politics as that art that tends to the health of the soul. See *GORGAS*, *supra* note 95, at 48 l. 464b.

¹⁰³ *Id.* at 39 l. 454e.

¹⁰⁴ Socrates initially defines this not as sophistry, but as rhetoric. See *id.* at 39 l. 455a. However, as the dialectic proceeds it becomes apparent that rhetoric is a manifold concept including at least three functions: “the prostitution of speech to pander to a crowd for ulterior motives of the speaker,” “the coercive use of speech to impose discipline on a person or a city,” and “the use of speech tailored to the predispositions of a single hearer to invite and provoke that hearer to follow the *logos* on his own.” Joe Sachs, *Introduction* to *GORGAS* 12, 14 (Joe Sachs trans., 2009). Socrates attacks only the first use of rhetoric, endorsing the latter two. See *id.* The term “rhetoric” is, therefore, ultimately misleading as the sort of speech from which Socrates distinguishes philosophical dialectic. The term “sophistry” also has its problems, since Socrates seems to distinguish sophistry from rhetoric. See *GORGAS*, *supra* note 95, at 49 l. 465c (saying that what rhetoric is to justice sophistry is to lawmaking). As Socrates quickly recognizes, however, “sophists and rhetoricians get mixed together in the same place dealing with the same subjects,” and so for our purpose the term “sophistry” is the most apt for the kind of speech at issue here. *Id.*

¹⁰⁵ See *GORGAS*, *supra* note 95, at 43 l. 459b (saying that for the sophist, “[t]here's no need at all for it to know how things stand with the subjects themselves; [he or she] just needs to have discovered some contrivance of persuasion to make it appear to those who don't know that it knows more than those who do know”).

¹⁰⁶ See *Euthydemus*, *supra* note 81, at 710 ll. 272a–b (showing the tactics in *Euthydemus*).

¹⁰⁷ See *GORGAS*, *supra* note 95, at 36 l. 452c.

gatherings has the power to enslave those who possess superior knowledge of the matter at issue.¹⁰⁸ Sophism may therefore be distinguished from eristic by its public context and purpose, and therein lies its especial danger. While the practitioner of eristic has the power to make a person look foolish in a frivolous conversation,¹⁰⁹ the purpose of sophistry lies in appropriating the functions of public institutions for private interests by means of deception.¹¹⁰

Socrates demonstrates that sophistry is not an inert tool that one may use for good or ill depending on the intent of the user,¹¹¹ but a practice necessarily ordered toward injustice. It may seem that persuasive public speech may simply bracket issues of justice, setting them aside rather than assailing them.¹¹² Socrates argues that this view of persuasive public speech considers speech too abstractly, because it does not consider the context and content of the speech.¹¹³ Persuasive speech necessarily has a certain structure: it seeks to persuade someone about something on some further basis. Rhetoric, as *public* persuasive speech, always seeks to persuade members of the public in respect to their civic role (as judges, jurors, voters, citizens, etc.) about matters of public concern.¹¹⁴ The persuasion of the public about matters of public concern must always be about what is right, and therefore always about what is just; rhetoric is always already about justice in one fashion or another.¹¹⁵ To put it another way, the rhetorician always attempts to persuade the members of the public about what they ought to do, or be, or think; and means that the rhetorician speaks about justice. But the rhetorician can persuade citizens about justice in two fundamentally different ways: the sort of persuasion that engenders belief without knowledge of what is just, and the sort of persuasion that provides belief with knowledge.¹¹⁶ The latter use of rhetoric possesses certain features in common with dialectic: it speaks according to the form of its object, and it is inherently pedagogical.¹¹⁷ This sort of rhetoric requires the speaker to have knowledge about justice and injustice in order to

¹⁰⁸ *Id.*

¹⁰⁹ See *supra* note 91 and accompanying text on the frivolity of eristic.

¹¹⁰ See GORGAS, *supra* note 95, at 36–37 ll. 452e–453a.

¹¹¹ Gorgias advances this view, when he compares rhetoric to combat sports, saying “just [because] one has learned boxing or no-holds-barred wrestling or fighting in armor so well as to be overpowering to friends and enemies alike . . . one doesn’t have to go around hitting and killing one’s friends just for that reason.” *Id.* at 41 l. 456d.

¹¹² Indeed, Gorgias omits any reference to justice from his initial definition of rhetoric, simply calling it the art of speech-making. See *id.* at 33–34 l. 450c.

¹¹³ See *id.* at 35 l. 451a.

¹¹⁴ See *id.* at 38 l. 454b.

¹¹⁵ See *id.* at 36–38 ll. 452e–454b.

¹¹⁶ See *id.* at 39 l. 454e.

¹¹⁷ *Id.* at 43 ll. 459b–c.

convey that same knowledge to his hearers.¹¹⁸ Sophistry, on the other hand, is distinguished by the fact that it concerns matters of justice without grounding its persuasion on the nature of justice itself.¹¹⁹ As Socrates puts it, the sophist does not need to know "how things stand with the subjects themselves; [he] just needs to have discovered some contrivance of persuasion to make it appear to those who don't know that [he] knows more than those who do know."¹²⁰ Sophistry is speech that persuades the public of what they ought to do, to be, or to think in regard to their civic roles without conveying the actual knowledge of what they ought to do, be, or think; and it is therefore inherently deceitful, being grounded not upon truth but upon the private interest of the speaker. Injustice is therefore intractably bound up with sophistry. There is public persuasive speech that expounds upon what is right or just on the basis of what is actually right or just, and there is public persuasive speech that purports to expound on what is right or just but in fact offers only a semblance, a deception concerning right and justice. There is no middle ground.

If the sophist cannot persuade citizens on the basis of the truth of the matter the sophist speaks about, the power of persuasion must arise from something other than the truth of the subject, while at the same time concealing this fact. Socrates calls the practice of sophistry a simulation of politics.¹²¹ Since sophistry speaks about justice without actually conveying or attempting to convey what justice is, it is a mere semblance of real political speech; i.e., speech that concerns what is just while at the same time conveying what is just.¹²² It is not quite accurate to say that sophistry conveys falsehoods; the practice of sophistry is itself a falsehood, a false imitation of true political speech.

Socrates illustrates the nature of sophistry's simulation by outlining an "art of pandering."¹²³ Bodily health is promoted by exercise, and the art of doctoring restores health once it is lost.¹²⁴ There are, however, corresponding practices which simulate the function of exercise and doctoring. Cosmetology is the practice of "shaping, coloring, smoothing, and clothing, so as to make them wrap an extraneous beauty around themselves, to the neglect of the native kind that comes through gymnastic exercise."¹²⁵ Likewise, cooking tasty food simulates the feeling of restoring well-being to the body, properly the province of doctoring, without

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.* at 48 l. 463d.

¹²² *See id.*

¹²³ *Id.* at 48–50 ll. 464b–466a.

¹²⁴ *See id.* at 48 ll. 464b–c.

¹²⁵ *Id.* at 49 l. 465c.

actually restoring the body.¹²⁶ The arts that tend to the health of the soul mirror those that tend to the health of the body; Socrates calls the art that preserves the health of the soul lawmaking, while the art that tends toward the restoration of health is justice.¹²⁷ The perverse form of lawmaking Socrates calls sophistry, while the perverted form of justice Socrates calls rhetoric, however, he admits there is not much of a distinction between the two besides their relative function (preserving and restoring health).¹²⁸ The critical point is that the practice of sophistry is itself a pretense, a perversion of political speech.

3. *The Carnegie Report's Criticisms of the Socratic Method Reconsidered.*—If the argument above simply demonstrates that Socrates himself did not practice the sort of method now commonly called the “Socratic method,” the method criticized by the Carnegie Report, then it would be significant to the current debate about legal education reform. Distinguishing between eristic and sophistry on the one hand, and dialectic or the Socratic method on the other, however, reveals not only that what the Carnegie Report criticizes ought to be called eristic or sophistry, but that the Socratic method itself engages in a similar (but more fundamental) critique of sophistry and from its inception was posed as an alternative to sophistry. Both the Carnegie Report and Socratic dialogue criticize the nihilism implicit in eristic, the resulting moral effect on its practitioners, and its pedagogical limitations. But where the Carnegie Report gives vague suggestions that classes in law schools ought to engage with normative issues rather than just setting them aside, Socrates gives us both the form (i.e., dialectic) and content (the idea of justice) necessary to move forward. In distinguishing between eristic and dialectic, we have discovered that the authentic Socratic method purports to be the solution to the problems created by the practice of eristic. The virtue of the Carnegie Report lies in recognizing the pedagogical failures of the form of eristic it claims law schools employ, but it failed to adequately articulate a solution. If that solution is the Socratic method practiced correctly, then we must do more than just distinguish dialectic in the form of the Socratic method from eristic and sophistry—we must offer a constructive account of dialectic.

B. An Outline of Dialectic

The following outline of the dialectical method is subject to several limitations. Foremost among these are that one cannot demonstrate dialectical logic in the abstract, as one can prove the validity of deductive

¹²⁶ See *id.* at 49 l. 465b.

¹²⁷ See *id.* at 49 l. 495c.

¹²⁸ See *id.* at 49 ll. 495c–d.

logic.¹²⁹ This point runs contrary to some popular views concerning truth and method. The Enlightenment project conceived of rational inquiry in a way that required a justification of the instrument or method to be used prior to its use in any particular inquiry, and so dialectic runs contrary to the Enlightenment concept of reason, since it is not amenable to such a proof. While the Enlightenment view may seem intuitive, a closer look reveals certain cracks in its edifice. The Enlightenment method requires that philosophical language be separated from its object.¹³⁰ If this initial severance cannot itself be justified, then the whole project is based on an original mistake; for one might suspect that there is no general, universal, and timeless structure of knowledge applicable to all objects — as Enlightenment thought presupposes — but only particular kinds of knowledge pertaining in various ways to particular entities and subject to the contingencies of history. Were this true, the Enlightenment concept of reason would be an unrealizable fantasy, and forms of inquiry that do not correspond with Enlightenment assumptions about method are not, for that reason, unreliable.

The following discussion of dialectical logic remains a propaedeutic to a dialectical inquiry into the purpose of legal practice. My method does not involve abstracting dialectical logic from such concrete inquiry and then applying that method to a topic as one applies a general principle to a particular instance. Rather, I will trace the general outlines of dialectic in such a way that it may better be recognized and practiced in a particular inquiry—particularly the question of the purpose of the legal profession.

By distinguishing dialectic from eristic and sophistry above, several general features of dialectic have been demonstrated: dialectic makes distinctions in words according to distinctions inherent in the relevant subject by taking up one hypothesis, then another to see where they lead. But this leaves open many questions about how this can best be performed: where do the propositions come from? What is the best way of testing them? In what ways are distinctions inherent in the subject-matter best identified? The particular answers to these questions can only be given in the course of a particular dialectical investigation, but Aristotle, in his writings on logic, provides general strategies that are of great help.

Aristotle identifies three uses of dialectic: for mental training (learning how to argue about subjects), for conversations (so that the incorrect views of persons might be corrected), and for philosophical science (dialectic allows us to identify the difficulties in various positions to better grasp the truth or falsity of the various points).¹³¹ Or to put it in the

¹²⁹ For example, one can see why the argument “all As are B, C is an A, therefore C is B” is valid, despite the fact that the terms are not particular entities or genera.

¹³⁰ Put more technically: the modern view of knowledge separates epistemology and ontology.

¹³¹ See TOPICA, *supra* note 73, at 277 ll. 101a25–35.

context of legal ethics training, dialectic can be used to develop the mental abilities of law students they will need to think about legal ethics, to correct their mistaken views about right and wrong in the context of the law, and to grasp the truth or falsity of various positions in legal ethics. To accomplish these things, dialectic uses every means at its disposal:¹³² empirical studies, life experiences, theoretical treatments of ethics, and so forth.

At the outset of the inquiry, dialectic surveys both common opinion and learned opinion, and establishes points of agreement and disagreement both within common opinion on the one hand and learned opinion on the other, as well as between common opinions and learned opinions. This survey establishes both dialectical propositions (i.e., propositions held to be true by everyone, by learned opinion, or those that seem straightforward and unparadoxical)¹³³ and dialectical problems (i.e., “something about which either men have no opinion either way, or most people hold an opinion contrary to that of the wise, or the wise contrary to that of most people, or about which members of each of these classes disagree among themselves”).¹³⁴

This initial survey serves an important purpose. It provides the context for the inquiry within which that inquiry must take place, for no inquirer can engage in his pursuit without being under the sway of what has already been said about the subject. Any attempt to discard the traditions within which one finds oneself without investigating the extent to which one stands under the sway of those traditions results in the uncritical and unconscious presupposition of that tradition or important elements of that tradition. As Hegel pointed out:

Any culture consists in general ideas and aims, in the range of the specific spiritual powers which rule life and consciousness. We possess these ideas, make them our ultimate determinants, run to them as our guiding threads in life, but we do not *know* them; we do not make them the object and interest of our consideration. Take an abstract example: everyone possesses and uses the wholly abstract category of *being*. The sun *is* in the sky; these grapes *are* ripe, and so on *ad infinitum*. Or, in a higher sphere of education, we proceed to the relation of cause and effect, force and its manifestations, etc. All our knowledge and ideas are entwined with metaphysics like this and governed by it; it is the net which holds together all the concrete material which occupies us in our action and endeavors. But this net and its knots are sunk in our ordinary consciousness beneath numerous layers of stuff. This stuff comprises our known interests and the objects that are before our minds, while the universal threads of the net remain out of sight and are not explicitly made the subject of our reflection.¹³⁵

¹³² See *id.* at 279 ll. 101b5–10.

¹³³ *Id.* at 295 ll. 104a8–12.

¹³⁴ *Id.* at 299 ll. 104b1–18.

¹³⁵ INTRODUCTION TO THE HISTORY OF PHILOSOPHY, *supra* note 56, at 27–28.

The failure to critically examine at the outset what one has picked up about the subject under discussion conceals one's own assumptions and their hidden influence on one's own thought. Without bringing these assumptions to light, not only can one not ascertain their truth or falsity, one cannot even understand the ineradicable contingency of one's own position. Surveying the traditions one necessarily inherits and inhabits raises the hidden influences of one's own thought to the level of consciousness, turning the apparatus of critical reason on these influences, and enhancing the ability of dialectical reason to rid oneself of erroneous opinions.

After one has performed this survey, one must begin to examine these opinions to see what holds up and what does not to transcend mere opinion. ("An opinion is *mine*, it is not an inherently universal absolute thought. But philosophy contains no opinions; there are no philosophical opinions.")¹³⁶ Some opinions may be self-contradictory, some may be disproven by simple empirical observation, and some opinions may be clearly disproven by others. These judgments must be made on the basis of the particular merits of the particular arguments; they cannot be determined in advance. The obviously false opinions may be set aside, and this leaves the remaining set of opinions more reliable than it was before. The remaining set of opinions may be re-examined for new insights, and the dialectic can move forward by modifying, accepting, or disregarding the various arguments.

Though the specific arguments must ultimately be judged on the basis of their particular merits, and this judgment belongs not to a study of dialectic in general but of some particular inquiry, Aristotle does offer general advice in the *Topics* for tactics that identify problems in arguments and in the relation of one argument to another. Most of these tactics are based on avoiding logical errors or category mistakes. Some of the advice is fairly straightforward and intuitive — one can explore the necessary consequences of an argument to test the validity of that argument¹³⁷ — but most are specialized, requiring knowledge of the distinction between essence and accident,¹³⁸ of the nature of genus, species, differentia, and so on.¹³⁹ In order to competently assess arguments, one simply must have some training both in logic and in related fields of knowledge required for the particular inquiry in which one is engaged.¹⁴⁰ The former is necessary

¹³⁶ *Id.* at 17.

¹³⁷ See TOPICA, *supra* note 73, at 352–53 ll. 112a17–112a24.

¹³⁸ See *id.* at 331 ll. 109a10–14.

¹³⁹ See *id.* at 421 ll. 120b15–25.

¹⁴⁰

We must bear in mind that there are two kinds of sciences. There are some which proceed from a principle known by the natural light of intelligence, such as arithmetic and geometry and the like. There are some which proceed from principles known by the light of a higher science: thus the science of perspective proceeds from principles established by geometry, and music from principles established by arithmetic.

for the formal assessment of an argument; the latter for the substantive assessment (for example, one cannot do political philosophy without having a working philosophic anthropology).

Once the survey and analysis (both formal and substantive) has begun, the various opinions — one's own and those one has inherited — give rise to various impasses. Skeptics use these impasses to demonstrate the impotence of reason, but one might suspect that perhaps rather than demonstrating the powerlessness of reason, the skeptic is perhaps only demonstrating his own lack of intellectual tenacity by giving up too soon. For Aristotle, these impasses serve not to quell the intellect but to stimulate it. *Aporiae*, the technical Aristotelian term for these sorts of problems,¹⁴¹ do not end the inquiry unresolved, but point the way to their own resolution.¹⁴² Fr. Joseph Owens summarizes the Aristotelian concept of *aporia*: “The scope of *aporiae* . . . includes the views of the earlier philosophers. It also extends to anything . . . that was overlooked by those thinkers. . . . In an *aporia* the intellect has no passage. It can make no headway. Something is holding it back.”¹⁴³

While the skeptic gives up on solving the *aporia*, leaving the intellect bound, Aristotle recommends exploring the *aporia* more deeply in order to identify what it is that blocks the intellect from understanding its object:

It is necessary, looking toward the knowledge that is being sought after, for us first to go over those things about which one must first be at an impasse [i.e., *aporiae*]. And these are all those things about these topics that some people have conceived in different ways, as well as anything apart from these that they might happen to have overlooked. . . . For the later ease of passage is an undoing of the things one was earlier at an impasse about, but it is not possible to untie a knot one is ignorant of. But the impasse in our thinking reveals this about the thing, for by means of that by which one is at an impasse, one suffers in much the same way as people who are tied up, for in both cases it is impossible to go on forward. For this reason it is necessary to have looked at all the difficulties beforehand, both on these accounts and because those who inquire without first coming to an impasse are like people who are ignorant of which way they need to walk, and on top of these things, because one never knows whether one has found the thing sought or not. And further, one must be better off for judging if one has heard all the disputing arguments as if they were opponents in a lawsuit.¹⁴⁴

An examination of what binds the intellect should reveal how it is bound, which in turn should show how the intellect may be unbound. This sort of thinking is quite natural to people in the everyday course

¹ SAINT THOMAS AQUINAS, *SUMMA THEOLOGIAE* 4 (2008).

¹⁴¹ See THE DOCTRINE OF BEING, *supra* note 65, at 211.

¹⁴² See *id.* at 215–16.

¹⁴³ *Id.* at 214.

¹⁴⁴ ARISTOTLE, *METAPHYSICS* 35 ll. 995a24–b5 (Joe Sachs, trans., 2002).

of things. When a person wishes to fix a computer, he first tries to find the cause of the problem — a loose wire, a software glitch, a virus — and the discovery of the problem makes possible its resolution. Furthermore, the better he understands the problem, the more the solution manifests itself. Similarly with thought: an inquirer may seek to understand what the nature of justice is, but find himself stymied in the attempt, whether by the discovery of equally plausible but mutually exclusive hypotheses or by a general weariness at finding one argument overturned after another. In the latter case, one can only counsel against misology,¹⁴⁵ which is more a matter of whether one possesses the requisite intellectual virtue than whether one reasons correctly. In the former case, the passage of the intellect is bound, and resulting in a state of aporia. The way out lies in understanding *why* and in what way one is in an aporia. For example, if the inquirer discovers that mutually exclusive hypotheses are equally compelling when he has framed the original question in a certain way, this points towards resolving the aporia by examining the way in which the problem was originally framed. Or again, the inquirer may find that both mutually exclusive hypotheses follow from a proposition already established, which mean that that proposition is incorrect and he must go back and re-examine that part of the argument. In any case, when one finds oneself at an impasse, one must understand how it was that one arrived at the impasse; this done, the impasse by its nature points toward passage though the aporia.¹⁴⁶

CONCLUSION

Just as sophistry is a simulation of politics, so too the case-dialogue method may be understood as a simulation of Socrates' method. In both cases, the deficient forms have the same shape as that from which they are derived, but differ because they have been turned away from their proper object. Thus, as the Carnegie Report relates, the case-dialogue method often causes students to feel confused, to realize that their previous opinions

¹⁴⁵ Socrates describes this intellectual malady in *Phaedo*. See *Phaedo*, *supra* note 91, at 77 ll. 89d–91d.

¹⁴⁶ This follows from Aristotle's epistemology. Aristotle does not hold to a strong subject-object distinction in which the mind, when it thinks truly, accurately represents an independent reality; rather, the intellect is united as one with its object in the act of knowing. See ARISTOTLE, ON THE SOUL 61–62 ll. 407a1–10 (Joe Sachs trans., 2004) (stating the “act of thinking is identical with the things thought”). Consequently, for Aristotle, education does not consist in causing students to hold the propositions or world-pictures that correspond with the reality of the subject matter, but in leading the student's intellect to unity with the object of inquiry. Lest the reader think this follows from a primitive, pre-scientific psychology, criticism of the subject-object distinction has become commonplace in contemporary philosophy. See generally CHARLES TAYLOR, *Overcoming Epistemology*, in PHILOSOPHICAL ARGUMENTS 1 (1995) (detailing the reaction against Cartesian and Kantian epistemology in both continental and analytic philosophy).

were not as well grounded as they had thought. Where Socrates used this state of confusion as an educational moment that made possible the abandonment of less reliable opinions,¹⁴⁷ the case–dialogue method turns for a solution not to the truth of the matter under discussion, but simply to the opinions of judges or legislatures, which are necessarily contingent. Although the subject under discussion in both the case–dialogue method and the Socratic method practiced dialectically is the same, the case–dialogue method looks to the decisions of courts or legislatures without asking whether the decision conforms with its object, while the Socratic method seeks to conform the opinions of the interlocutors with something like what right, or justice, or the good dictates, and so the opinions of any court or legislature are subject to being rejected as inadequate.

Both the case–dialogue method and the Socratic method employ colloquy between a teacher and his students in which the interlocutors first take up one position, then another to see where they lead. This habituates students in some aspects of critical reason, a reason that one can turn on one's own views to examine their reliability. But because the case–dialogue method in its pure form leaves aside issues of justice, it unhinges legal speech from its object and — as the Carnegie Report recounts — covertly habituates students in a certain nihilism in which an argument for anything can be made and no real resolution can be had except by the act of will of a sovereign. Socrates, however, used the practice of taking up alternate hypotheses as a way of directing speech toward its object, making distinctions according to the form of the object. Unless classroom dialogue opens itself to the object of political speech, i.e., justice or right, it serves only one side of the duties legal professionals have. Being able to nimbly construct arguments helps in the representation of the client, but does not help a lawyer to consider what is actually just in the situation, preventing the lawyer from fulfilling his or her broader social duties.¹⁴⁸ The Socratic method, by its very nature, cannot set aside the question of broader social duties.

We have seen at the theoretical level that dialectic provides an answer to skepticism by recognizing skepticism as a moment of dialectic itself, but the force of this answer cannot be fully demonstrated in the abstract; dialectic must be performed in the course of a particular inquiry. This leads us from the plane of the theoretical back to the practical. We return from the general question of the possibility of a rational basis for normative ethics to the question Judge Krieger and her task force faced—how does this work in practice?

We have seen that dialectic is a form of reasoning that takes up various

¹⁴⁷ Socrates' colloquy with Meno's attendant concerning geometrical proofs is an instructive example. See *Meno*, *supra* note 88, at 881–86 ll. 82b–85d.

¹⁴⁸ See *supra* Part I:D (discussing the legal profession as involving duties to both clients and the public).

arguments in a systematic way, analyzing them in themselves and in relation to each other both formally (i.e., in terms of logical validity) and substantively (i.e., in a broader philosophical context), with a view toward moving from private opinion to grasp the truth of the subject matter. We have seen that the case–dialogue method largely has the same shape as the Socratic method, but differs in terms of its content or object. A first step in implementing the Carnegie Report’s ethical apprenticeship would simply be setting aside sufficient time to discuss normative issues; to not make time for these questions teaches students that ethical questions are simply not worth the time. Employing the Socratic method (in its authentic, rather than deficient, form) would therefore employ many of the same practices — colloquy, the “educational moment” when the student realizes he did not know what he thought he did, taking up various hypotheses, and so forth — but essentially differ in its object. Wherever the case dialogue method strays from its tacit positivism and begins to comment on the justness of a decision — and I believe this happens far more often than the Carnegie Report suggests — it begins on the path toward its authentic form. This departure must not be regarded as a departure from the law, a matter of mere opinion, but the natural striving of political or legal speech to be pursued in a rigorous, orderly, and rational fashion. This orderliness is not threatened by the fact that one finds (or should find) a wide array of opinions in the classroom; for the variety of opinions, as we have seen, contributes to the effectiveness of the Socratic method by giving it a rich variety of materials on which it is to work.

In these respects, dialectical practice in the form of the Socratic method would not seem to be terribly difficult to implement. Opening the conversation to normative issues, articulating the variety of opinions both of the students and of the casebook material, and beginning to debate the truth of these opinions all seem to be feasible with the resources, physical and intellectual, that law schools already possess. It is one thing to reason, however, and another to do it well. In order to effectively practice Socrates’ method, the professor will have to some proficiency in both logical analysis and the substantive fields of knowledge required to assess the truth of the various opinions (law obviously, but also at least moral philosophy and history). Any doubt that the Socratic method, as I have described it, can be used effectively in a classroom may be dispelled by examples such as Michael Sandel’s famous Harvard class on justice, which has been made available to the public.¹⁴⁹

These difficulties cannot be avoided if law schools wish to begin answering the serious challenges the Carnegie Report raises and if law schools wish to take legal ethics seriously. Law schools cannot avoid taking

149 *Justice with Michael Sandel*, HARVARD UNIV., www.justiceharvard.org (last visited Sept. 16, 2011). Michael Sandel’s class contains most of the methods of dialectic used above: gathering disparate opinions, playing them off one another, entertaining alternative theories, etc.

a stand on what it means to be a lawyer, on how lawyers ought to behave, and on what principles lawyers should look to when tough decisions must be made. To simply avoid the question is to impliedly proclaim that there is no standard of behavior for lawyers; to train students only in the rules accepted by the various jurisdictions is to covertly catechize students in the doctrines of legal positivism. Either of these positions may or may not be the case, but they cannot merely be assumed or else their transmission would be indoctrination.

